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# The (Slight) Democratization of Trademark Contests

**By: Jeff Geiger.** ***Thursday, February 23rd, 2012***

What is the purpose of trademark law? To prevent unfair competition by (a) providing assurance that goods/services are of a certain quality/consistency, and, critically, (b) assisting consumers in making purchasing decisions. For example, if I go to a McDonald's restaurant in McLean or Richmond, I am (generally) guaranteed the same type of restaurant service. Again, the objective is to grant certainty to the consumer and, by doing so, to build goodwill in favor of the producer.

The problem arises when the producers (or trademark holders) have a dispute concerning whether Company A or Company B is entitled to use a particular mark or brand to identify its goods and services. It is in that situation that reasonable minds can differ as to whether the marks are confusingly similar. Eventually, if the businesses cannot work it out between themselves, the lawyers get invited to the party.

For example, you started a pest control company a decade ago and use in your advertising the slogan "We will eat them up." A neighboring Mexican restaurant starts up a few years later and uses the tagline "You will eat us up." Problem? I don't think so (although there is hopefully no cross-distribution agreement between the pest company's kills and the restaurant's food products). And why is that? Because the companies are not in the same industry and there would be no customer confusion.

Still, in years past, he with the biggest stick (and the biggest checkbook) could force a competitor (or even a non-competitor) to stop using a name or mark or brand by threatening what is typically very expensive, time-consuming or resource intensive litigation. And part of why they do this is so they can avoid being genericized such that the mark is no longer deemed valid (think: aspirin, thermos, yo-yo, escalator–all trademarks that later became unprotected because the public associated with the marks as if they were mere generic products, such as soda). The good news is that there is a growing (even if slight) ability of the proverbial little guy to fight back where the claim is meritorious (which is by no means the norm). Over the past five years, I have seen trademark owners become more careful in who they seek to shut down. While owners have to be zealous in protecting their marks, diligence has its boundaries.

I have some techniques that I use in protecting trademark owners, both big and small, but I found it encouraging (and the reason for this posting) the recognition in this recent **Wall Street Journal article** as to efforts to combat predatory trademark practices by going "rogue" so to speak and taking the dispute to the online street. Another **good resource** cataloguing trademark cease and desist notices is sponsored by the **Electronic Frontier Foundation** and a number of universities.

Clearly, our economy is based to a great deal on intellectual property but it is a fine line when one company says another company should not be using a certain brand name. What we don't want to happen is a stifling of innovation and the marketplace such that consumers are not able to choose between competing products.